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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 LYCURGAN INC. dba ARES ARMOR,

12 Plaintiff

13 v.

14 B. TODD JONES, in his official capacity  
as Head of the San Diego Bureau of  
15 Alcohol, Tobacco, Firearms and  
Explosives; and DOES 1-10,

16 Defendants.  
17

Case No.: 14CV1679 JLS (BGS)

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS

DATE: November 6, 2014  
TIME: 1:30 p.m.

Hon. Janis L. Sammartino

18  
19 I

20 INTRODUCTION

21 Plaintiff has filed a civil suit seeking the return of property seized pursuant to a  
22 search warrant issued by Magistrate Judge Bernard G. Skomal. Plaintiff invokes the  
23 Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. § 983, as the statutory basis  
24 for this relief. But, as its name suggests, CAFRA governs civil forfeiture proceedings  
25 and provides no jurisdictional basis for ordering the return of property seized pursuant  
26 to a search warrant issued under the Federal Rules of Criminal Procedure. The Court  
27 therefore lacks jurisdiction over Plaintiff's complaint.  
28

## II

STATEMENT OF FACTSA. The AR-15 Lower Receiver

The AR-15 is a semi-automatic, civilian version of the .223-caliber M16 machine gun used by the United States military. See Exhibit 1 (Declaration of Special Agent Marks) at ¶ 6. The AR-15 is comprised of many parts, including the (1) lower receiver, (2) upper receiver, (3) stock, (4) barrel, and (5) magazine. Id.

Most firearm parts are not subject to regulation and can be bought and sold without a background check. The lower receiver, however, is different. The lower receiver is the body of the firearm to which the other parts are attached. It is considered the “firearm” and, therefore, is subject to firearms laws enforced by the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives. See Exhibit 2 (Declaration of Brice P. McCracken) at ¶ 4. Only Federal Firearms Licensees can manufacture firearms for sale and the licensee is required to mark all such firearms with a serial number. See generally 18 U.S.C. §§ 922(a) and 923(i). Federal Firearms Licensees are also required to perform a background check prior to the transfer of any firearm to a non-licensee.

B. The Seizure of 5,804 EP80 Lower Receivers from Plaintiff

EP Armory is under investigation in the Eastern District of California for illegally manufacturing “EP80” lower receivers, which are commonly used to make AR-15 style rifles. Ex. 2 at ¶¶ 5-6; Ex. 1 at ¶ 6. ATF has determined that the EP Armory EP80 lower receivers are firearms. Ex. 2 at ¶ 4. But EP Armory does not have a Federal Firearms License to lawfully manufacture firearms for sale and, therefore, cannot legally engage in the sale and transfer of firearms. Ex. 2 at ¶ 3. Moreover, the EP80s do not bear any manufacturer’s markings or serial numbers and were being sold without background checks to non-licensees. Ex. 2 at ¶ 5. That result

1 is contrary to the manufacturing provisions of the Gun Control Act, 18 U.S.C. § 921 et  
2 seq.

3 Plaintiff Ares Armor – which also does not have a Federal Firearms License to  
4 sell firearms, ex. 1 at ¶ 7 – was receiving and selling EP80s manufactured by EP  
5 Armory. Ex. 1 at ¶ 5. On March 15, 2014, ATF agents seized 5,804 EP80s from  
6 Plaintiff pursuant to a search warrant issued by Judge Skomal. Id. at ¶ 8. ATF has  
7 determined that the EP80s seized from Ares Armor meet the definition of firearms  
8 under 18 U.S.C. § 921(a)(3)(B). Ex. 2 at ¶ 4. They are presently being held as  
9 evidence in connection with the Eastern District of California’s investigation of EP  
10 Armory. Id. at 6.

#### 11 C. Plaintiff’s Lawsuits Against ATF

12 This is the third lawsuit that Plaintiff Ares Armor has filed over ATF’s seizure  
13 of the EP80 lower receivers from Ares Armor. The first lawsuit, Lycurgan, Inc. dba  
14 Ares Armor v. Jones, 14-cv-0548-JLS (BGS) (“Ares Armor I”), sought an injunction  
15 prohibiting ATF from taking any action to seize the EP80 lower receivers. That  
16 lawsuit was mooted by ATF’s seizure of the lower receivers pursuant to the search  
17 warrant issued by Magistrate Judge Skomal. Ares Armor has a pending motion to  
18 amend its complaint in that case. Among other things, Ares Armor’s motion requests  
19 leave to sue (in his individual capacity) the ATF employee who examined the EP  
20 Armory EP80s and opined that they are firearms for allegedly violating Ares Armor’s  
21 First Amendment right to free speech. See Ares Armor I (ECF #35-4) at 38.

22 The second lawsuit, In the Matter of the Search of: Ares Armor et al., 14-cv-  
23 1424-JLS (BGS) (Ares Armor II), sought to unseal the search warrant affidavit issued  
24 under seal by Magistrate Judge Bernard G. Skomal. That lawsuit was mooted by  
25 ATF’s voluntary disclosure of the affidavit. See Ares Armor II (ECF #16). On  
26 September 19, 2014, Ares Armor filed a notice of appeal in that case. Id. (ECF #26).

1 This lawsuit, Ares Armor III, seeks to compel the return of the lower receivers  
2 seized in the search warrant. See Complaint (ECF #1) at 5. The complaint invokes  
3 CAFRA, 18 U.S.C. § 983, as the jurisdictional basis for seeking this relief. Id. at 2-  
4 4. CAFRA, however, is a civil asset forfeiture statute and provides no jurisdictional  
5 basis for ordering the return of property seized pursuant to a criminal search warrant.

### 6 III

#### 7 ARGUMENT

8 CAFRA applies only to “property seized in a nonjudicial civil forfeiture  
9 proceeding under a civil forfeiture statute.” 18 U.S.C. § 983(a)(2)(A). CAFRA does  
10 not apply where there is an independent legal basis – such as a criminal search warrant  
11 – for seizing and retaining the property. See Celata v. United States, 334 Fed. Appx.  
12 801, 802 (9<sup>th</sup> Cir. 2009) (unpublished) (CAFRA does not provide a jurisdictional basis  
13 to compel government to return property seized pursuant to a validly executed search  
14 warrant); Wiebe v. National Security Agency, 2012 WL 4069746, \*8 (D. Md. 2012)  
15 (unpublished) (“When the Government seizes property for non-forfeiture purposes,  
16 the notice requirements of [CAFRA] do not apply.”).

17 The EP80s at issue here were seized pursuant to a search warrant issued by  
18 Magistrate Judge Skomal pursuant to Fed. R. Crim. P. 41. Ex. 1 at ¶ 8. One of the  
19 specific legal bases for seizure in the search warrant was “evidence of a crime.” See  
20 Application for Search Warrant (attached as Exhibit 1 to United States Supplemental  
21 Briefing in Ares Armor II (ECF #14-1) at 2); accord Fed. R. Crim. P. 41(c)(1) (“A  
22 warrant may be issued for . . . evidence of a crime.”). Consistent with the warrant,  
23 ATF is retaining the EP80s seized from Ares Armor as evidence of the illegal  
24 manufacture of firearms in the EP Armory criminal investigation. Ex. 2 at ¶ 6.

25 In sum, the EP80s at issue in this case were not seized in a “nonjudicial  
26 forfeiture proceeding.” 18 U.S.C. § 983(a)(2)(A). Instead, as in Celata, ATF “has an  
27 independent legal basis for retaining the various firearms . . . it seized.” 334 Fed.  
28

1 Appx. at 802. This Court therefore lacks subject matter jurisdiction over Plaintiff's  
2 CAFRA complaint and should dismiss it pursuant to Fed. R. Civ. P. 12(b)(1) and  
3 12(b)(6).

4 IV

5 CONCLUSION

6 For the foregoing reasons, the Court should dismiss Plaintiff's complaint.

7 DATED: September 22, 2014

Respectfully submitted,

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9 United States Attorney

10 s/ Daniel E. Butcher  
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